United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

21,214

No. 21,214

WALTER H. E. JAEGER,
Appellant,

v.

UNITED STATES OF AMERICA
Appellee.

Appeal from the United States District Court
For the District of Columbia

PAUL J. Mc GARVEY
230 Woodward Building
Washington, D. C. 20005
Attorney for Appellant

Washington, D. C. · THIEL PRESS · 202 · 393-0625

STATEMENT OF QUESTIONS PRESENTED

1. Did the District Court err in granting the appellee's motion for summary judgment?

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Walter H. E. Jaeger, brought an action for damages against the appellee, United States of America, in the United States District Court for the District of Columbia pursuant to Title 28 of the United States Code, Section 1346 (B) and Title 28 of the United States Code, Section 1402 (B).

Jurisdiction for the appeal to the United States Court of Appeals for the District of Columbia Circuit is predicated on Title 28 of the United States Code, Section 1291.

STATEMENT OF THE CASE

Appellant filed a complaint against the appellee, United States of America, in the United States District Court for the District of Columbia seeking damages for the loss of an overcoat and gloves which the Complaint alleged the appellant had delivered to the appellee and the latter failed to return said personal property. (J.A. 1)

The Complaint alleged that the appellant-plaintiff on or about January 21, 1965 visited the Officer's Open Mess, an agency of the United States, at Fort Meade, Maryland. (J.A. 1) At that time the appellant-plaintiff deposited his overcoat and gloves in a cloak room provided for its members and guests by the Officer's Open Mess. (J.A. 1) Subsequently, the Complaint alleges the appellant-plaintiff returned for his overcoat and gloves but the same were missing. (J.A. 1) Appellant-plaintiff made demand upon the appellee for the return of said attire but the latter failed to return his property. (J.A. 1)

The Appellee submitted written interrogatories, supplemental interrogatories and requests for admissions. (J.A. 3, 7) The Appellant filed Answers to the Interrogatories and Supplemental Interrogatories and replied to Appellee's request for admissions. (J.A. 5, 8, 9) Appellee filed its Motion for Summary Judgment together with a memorandum of Points and Authorities. (J.A. 9, 11) Appellant filed his Opposition to said Motion and Points and Authorities in Support thereof. (J.A. 14) On June 16, 1967 the District Court granted the Appellee's Motion for Summary Judgment. (J.A. 16)

STATUTES, TREATIES, REGULATIONS OR RULES INVOLVED

Rule 56 (B) FOR DEFENDING PARTY. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

STATEMENT OF POINTS

1. The District Court erred in granting the Appellee Summary Judgment.

SUMMARY OF ARGUMENT

There was a factual issue as to whether a bailment existed and the District Court erred in granting the Appellee's Motion for Summary Judgment.

ARGUMENT

The Appellant, Walter H. E. Jaeger, was a member of the Officer's Club at Fort George G. Meade, Maryland. (J.A. 6) On January 21, 1965 Appellant, with his wife, attended a dinner and bingo party at the Officer's Open Mess at Fort George G. Meade, Maryland. (J.A. 6) Upon arriving the appellant placed his overcoat and gloves on a hanger in a cloak room provided in the Officer's Open Mess. (J.A. 1) The cloak room had a door and numerous hangers and there was a sign in front of the room entrance which stated, "members only". (J.A. 6) After the dinner and bingo party the appellant returned for his coat but it was missing (J.A. 1) Appellant notified the management but they failed to return his coat. (J.A. 1) There is nothing in the record in the District Court that indicates conclusively whether there was or was not an attendant at the cloak room (J.A. 7, 8)

The lower Court granted the Appellee's Motion for Summary Judgment finding that no bailment existed as a matter of law. (J.A. 16) In ruling as a matter of law that there was no bailment between the appellant and the Officer's Open Mess the District Court erred. There was no expressed oral or written agreement between the parties but this was not conclusive as to whether a bailment existed. There was a bailment implied in fact. There was a sign designating "members only", which was a general offer to members of the club to deposit their belongings in a room specifically

provided for the members. Significantly, the appellant has attended functions on numerous occasions in the past at the Officer's Open Mess and on those occasions placed his personal attire in the cloak room. (J.A. 4, 6) In the case of *Kampf v. Yokell*, 267 App. Div. 914, 47 N.Y.S. 2d 195, the Court ruled that the employer's maintenance of a dressing room for employees was an express invitation to plaintiff employee to place her coat in the dressing room, resulting in a bailment for the mutual benefit of the plaintiff and employer, and there was a consequent duty upon employer to deliver the coat on demand or to account for its absence. There is more reason to find an implied bailment in this case than in the *Kampf* case because in this case there was a sign "members only". (J.A. 6) The sign was an express and continuous invitation to a designated class of persons of which appellant was a member to deposit their belongings in the place specifically designated and marked by the Club. Appellant paid for his dinner and bingo fee. (J.A. 6) In addition Appellant as a member of the Club paid dues. (J.A. 6) Therefore, even though the Appellant paid nothing specifically for the use of the cloak room, there was a bailment for mutual benefit. In the case of *Johnson v. B. & N., Inc.*, 190 Super 586, 155 A 2d 232, the Court held that even though the patron paid nothing for the check-room service, a mutual benefit bailment resulted when she utilized the check room service which was an incident of restaurant business and necessary for the accommodation of its patrons. Similarly, the Court held in *Nuell v. Forty-North Corp.*, 358 S.W.2d 70 that even though the restauranteur by reason of patronage of customers resulted in the restauranteur being bailee for mutual benefit of both parties. The consideration in the present case for such a mutual benefit bailment was the appellant's payment of club dues, bingo fee and dinner check. *Fidelity Storage Co. v. Foster* 51 F 2d 439, 60 App. D. C. 277; *Williston on Contracts*, Third Edition by Jaeger, Volume 9, Section 1040, page 913, paragraph 7.

The entire transaction precipitating this litigation took place in the State of Maryland. Therefore, the law of Mary-

land is applicable. *Croissant v. Empire State Realty Co.* 29 App. D. C. 538. There appears to be no Maryland appellate decision entirely analogous. The case most similar factually which was decided by the Maryland Court of Appeals is the case of *Schleisner Co., Inc. v. Birchett*, 96 A 2d 494, 202 Md. 360. In the latter case an employee asked the personnel manager for a locker and was instructed to hang employee's garments in an executive closet. The appellate forum concluded that there was a bailment for hire and that when the bailor proved the bailment and the bailee's failure to return the burden was then on the bailee to account for the property. In the present case the only real distinction is that there was no oral permission or consent given to the appellant by an agent of the appellee. However, there was the sign marked, "members only". (J.A. 6) The sign was obviously placed over the cloak room only after club authorities ordered it and the same remained there with their obvious knowledge and consent. This factual distinction should not be accepted as a rationale basis for a legal distinction between the *Schleisner* decision and the instant case.

There are several pertinent decisions in other jurisdictions. The most apposite opinions involve litigation between patrons and restaurants. In *Buttman v. Dennett*, 9 Misc. Rep. 462, 30 N.Y.S. 247, the Court ruled that a restaurant keeper is liable for wearing apparel as a bailee. There is certain dicta in the case of *Montgomery v. Lading*, 30 Misc. 92, 61 N.Y.S. 840 which appears extremely relevant especially so because the opinion makes a significant distinction between types of restaurants where bailments are involved. In the *Montgomery* case the Court stated at page 843: "Each case must largely depend upon its particular facts and circumstances, for it is well known that there are all kinds of restaurants. In some of them good taste and etiquette require that a customer should take his hat and overcoat off while taking a meal, while in others, especially the so-called "quick lunch" establishments, customers frequently neither remove hat nor overcoat." In that case the Court also stated

that an implied bailment could arise where an overcoat was necessarily laid aside under circumstances showing at least notice of the fact and of such necessity to the keeper of the restaurant or his servants. The Officer's Open Mess is the military counterpart to a civilian restaurant. The Officer's Open Mess is the equivalent of a reputable civilian restaurant or a refined dining establishment. This is so for the reason that the members of the Officer's Club are only admitted to membership on the basis of their rank in the military service and usually their rank was acquired as the result of the Officer's educational background and military achievement.

Appellant never had an opportunity to demonstrate facts in support of his allegations that a bailment existed. Such factual issues as,

(1) The nature and extent of the previous relationship between the appellant and the Officer's Club in handling appellant's apparel.

(2) Whether the cloak room was attended and if so the manner and circumstances in which it was attended on the occasion in question as well as on prior occasions.

(3) Whether the Club had actual or constructive knowledge of the presence of the appellant's personal property in its cloak room.

(4) Whether a custom had been established at the Club whereby personal belongings were deposited in the cloak room.

(5) Whether the agents of the Officer's Open Mess had a key to the cloak room thus affording the Club custody and control of said room.

The foregoing are only a few of the factual questions relevant to the legal query as to whether a bailment existed. The true test before the District Court was whether the pleadings and other matter relevant to the Motion for Summary Judgment, considered most favorably to appellant,

raise genuine issues of fact. *Davidson v. Coyne* 120 U. S. App. D. C. 377, 347 F 2d 471. It is respectfully submitted that in any event a factual issue existed.

CONCLUSION

For the foregoing reasons the Appellant respectfully urges that the decision of the District Court be reversed.

Respectfully submitted,

PAUL J. Mc GARVEY
230 Woodward Building
Washington, D. C. 20005
Attorney for Appellant

CONTENTS OF JOINT APPENDIX

In the

UNITED STATES DISTRICT COURT

For the District of Columbia

WALTER H. E. JAEGER
506 E. Street, N. W.
Washington, D. C.
Plaintiff,

v.

UNITED STATES OF AMERICA
Defendant.

Civil Action
No. 379-66

COMPLAINT
(Damages)

1. This Court has jurisdiction pursuant to Title 28 United States Code, Section 1402 (b).

2. On or about January 21, 1965, the plaintiff, Walter H. E. Jaeger, visited the Officer's Open Mess an agency of the United States, at Fort Meade, Maryland. At said time and place the plaintiff deposited his overcoat and gloves in a cloak room provided by the Officer's Open Mess. Subsequently, the plaintiff returned to procure his overcoat and gloves but same were missing. Plaintiff made demand upon the defendant for their return but the defendant has failed and refused to redeliver said personal property to the plaintiff. At the time of the bailment, the overcoat and gloves were valued at one hundred forty two ($142.00) dollars.

WHEREFORE, plaintiff, Walter H. E. Jaeger, demands judgment of the defendant, United States of America, in the sum of one hundred forty two ($142.00) dollars.

PAUL J. Mc GARVEY
Attorney for Plaintiff

ANSWER

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The defendant, United States of America, answers the individual paragraphs of the complaint as follows:

1. Denied.
2. Denied.

Third Defense

Plaintiff's damage and injury as alleged in his complaint are due to his own negligence in exercising control over his property.

David G. Bress
United States Attorney

Joseph M. Hannon
Assistant United States
Attorney

John E. Hogan
Assistant United States
Attorney

[Certificate of Service]

INTERROGATORIES

TO: Walter H.E. Jaeger
c/o Paul J. McGarvey, Esquire
230 Woodward Building
Washington, D. C. 20005

The following interrogatories are addressed to you by the defendant, United States of America, pursuant to Rule 33, Federal Rules of Civil Procedure. You are required to answer these interrogatories separately and fully in writing, under oath, and to serve a copy of your answer on the United States Attorney for the District of Columbia, attorney for said defendant, within fifteen (15) days after the interrogatories are served upon you:

1. State your full name, date of birth, and occupation.
   (a) State your present legal address.
   (b) State your present mailing address.
   (c) Give the date when you assumed present residency.
2. State whether you are now or have ever been a member of an active component of the Armed Forces of the United States. If so, state:
   (a) Serial Number.
   (b) Branch of service.
   (c) Dates and places of induction and discharge in active service.
   (d) Name of reserve component, if any.
   (e) Approximate period of service in reserve component.
3. Were you in an active or reserve component on January 21, 1965? If so, state the designation of the active or reserve component of which you were a member.
4. What was the date, time and place of the last active or reserve activity or meeting attended by you prior to 7:00 P.M. on January 21, 1965?

5. State the date, approximate time and place where the delivery to the defendant of the overcoat and gloves was made.

6. What type of bailment, if any, does plaintiff contend this to be?

7. List all facts plaintiff relies on which tend to show that the relation between plaintiff and defendant is one of bailment.

8. Does plaintiff contend that the cloakroom in which he left his coat and gloves was attended? If so, state the name and address of each person plaintiff claims was in attendance in the cloakroom.

9. With regard to the alleged bailment, state:
   (a) Agency or department of defendant involved.
   (b) Circumstances, terms and conditions of the delivery, including the reason therefor.
   (c) The consideration given and received by the respective parties for the delivery.
   (d) Whether any oral or written authorization was given by any representative of defendant for the delivery.
   (e) The length of time that plaintiff's property was allegedly in defendant's possession, from delivery by plaintiff on January 21, 1965, until demand was made for the return of plaintiff's property.

10. If plaintiff has possession or custody and will do so without a motion to produce, attach a copy of the authorization for delivery to the answers to these interrogatories.

11. Is Plaintiff familiar with the place where the property was stored while in defendant's possession? If so, describe the place used for the purpose, including location and approximate dimensions.

12. Has plaintiff ever visited the Officers' Open Mess at Fort Meade, Maryland, prior to January 21, 1965? If so, state:

(a) The approximate dates of each visit.
(b) Whether personal property was left in a cloakroom on any of such visits and indicate upon such occasions, if any, such property left in a cloakroom.

13. Has plaintiff ever lost any other property while attending the Officers' Open Mess at Fort Meade, Maryland? If so, state the dates and circumstances of such losses.

14. List the name and address of each person who plaintiff knows is acquainted with any facts concerning the property lost on January 21, 1965 and state in detail what is known by each such person.

15. Was any demand made to defendant for the return of plaintiff's property? If so, state the date and time of such demand; who made the demand; and the person to whom such demand was made.

16. By what method does plaintiff calculate the value of the property lost?

17. Has the plaintiff ever been a plaintiff or defendant in a civil suit? If so, state the name of the case, the action number thereof, and the disposition.

Henry A. Berliner, Jr.
Assistant United States Attorney

[Certificate of Service]

ANSWER TO INTERROGATORIES

1. Walter Henry Edward Jaeger, 23 Sep. 02; Teacher and writer.
   a. 6910 Ingraham St. Riverdale, Md.
   b. " " "
   c. 1959

2. Yes; a. 0-186367; b. Army; c. Retired in 1960, after more than 30 years service; ORC; over 30 years.
3. Yes; Retired.
4. Not known.
5. Jan 21, 1965; 7 p.m.; Ft. George G. Meade, Maryland.
6. Bailment for hire, with some kind of fiduciary relation.
7. Plaintiff is a member of the Officers Mess at Ft. Geo. G. Meade which maintains a cloak room for its members and guests so that the premises will not become cluttered by articles of apparel strewn over the premises making the club unsightly, and thus offensive to the good taste and esthetic predilections of the members and guests.
8. Not known.
9. a. U.S. Army; b. Bingo party and dinner given by Officers Mess; c. Payment of bingo fee, club dues and dinner check; d. Availability of cloak room and notice to use its facilities for wearing apparel; e. 3 hours.
10. Not understood.
11. Cloak room is adjacent to side entrance of club clearly marked *"MEMBERS ONLY"* and is equipped with hangers and a door;
12. Yes; a. frequently; b. From time to time, articles of clothing were left in cloak room.
13. No.
14. Mrs. Marie J. Jaeger, 6910 Ingraham St. Riverdale, Md.
15. Yes; January 21, 1965; Colonel W.H.Jaeger notified Club Manager Aiello and club attendant at about 10:05 p.m.

16. Purchase value.

17. Jaeger v. Dunn, Alexandria Mun. Court; Jgmt for plaintiff.

Walter H.E. Jaeger

SUPPLEMENTAL INTERROGATORIES

TO Walter H. E. Jaeger
c/o Paul J. McGarvey, Esquire
230 Woodward Building
Washington, D. C. 20005

The following interrogatories are addressed to you by the defendant, United States of America, pursuant to Rule 33, Federal Rules of Civil Procedure. You are required to answer these interrogatories separately and fully in writing, under oath, and to serve a copy of your answer on the United States Attorney for the District of Columbia, attorney for said defendant, within fifteen (15) days after the interrogatories are served upon you:

18. In your answer to Interrogatory No. 8, dated December 23, 1966, you answered "not known" to the following question:

> "Does plaintiff contend that the cloakroom in which he left his coat and gloves was attended? If so, state the name and address of each person plaintiff claims was in attendance in the cloakroom."

Please state:

(a) Whether the cloakroom in which you left your coat and gloves was attended at the time you deposited such articles. *I thought it was, but I do not know definitely.*

(b) Whether you personally placed the articles in the cloakroom. If not, state the name and address of the person who did place the articles in the cloakroom.
Yes.

(c) Whether you contend that the cloakroom in which you left your coat and gloves was attended at any time between 7:00 p.m. and 10:05 p.m. on January 21, 1965. If so, state the approximate time when you observed the cloakroom in attendance and the name and address of each person whom you claim to have been in attendance. *Not known.*

19. State whether you have ever seen, prior to 10:05 p.m., January 21, 1965, in the Fort Meade Officers' Mess, signs stating "Not Responsible for Coats Left in Check of Club" located at:

(a) The entrance of the Officers' Club. *No.*

(b) Either of two cloakrooms located inside the Officers' Club. *No.*

20. State the approximate date and place that you purchased the overcoat and gloves which are the subject of this action. *1964 – Browning King, Washington, D.C.*

Henry A. Berliner, Jr.
Assistant United States Attorney

[Certificate of Service]

ANSWERS TO SUPPLEMENTAL INTERROGATORIES

18. (a) I thought it was, but I do not know definitely.
(b) Yes.
(c) Not known.

19. (a) No.
(b) No.

20. 1964—Browning King, Washington, D.C.

Walter H. E. Jaeger

[Jurat]
[Certificate of Service]

REPLY TO REQUEST FOR ADMISSION

1. Denied.

Walter H. E. Jaeger

[Certificate of Service]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant United States of America by its attorney the United States Attorney for the District of Columbia and respectfully moves this Court for summary judgment on the ground that there exists no genuine issue as to any material fact that the defendant is entitled to judgment as a matter of law.

This motion is based upon the undisputed facts as disclosed in the pleadings; defendant's interrogatories dated November 3, 1966 (hereinafter referred to as Int.); defendant's supplemental interrogatories dated December 28, 1966 (hereinafter referred to as Supp. Int.); and defendant's request for admission dated February 3, 1967 (hereinafter referred to as Req. for Adm.).

David G. Bress
United States Attorney

Joseph M. Hannon
Assistant United States Attorney

Henry A. Berliner, Jr.
Assistant United States Attorney

[Certificate of Service]

STATEMENT OF FACTS PURSUANT TO LOCAL RULE 9(h)

1. On November 21, 1965, plaintiff visited the Officers' Open Mess at Fort Meade, Maryland and deposited his overcoat and gloves in a cloakroom (Complaint, p. 1).

2. The overcoat and gloves were deposited by the plaintiff at 7:00 P.M. (Int. No. 5). At 10:05 P.M. the plaintiff notified the Club manager that his overcoat and gloves were missing (Int. No. 9(e); Int. No. 15).

Plaintiff personally placed the property in the cloakroom (Supp. Int. No. 18(b)).

Plaintiff saw no one in or about the cloakroom on January 21, 1965 who plaintiff concluded was an attendant in such cloakroom (Req. for Adm., admitted[1]).

David G. Bress
United States Attorney

Joseph M. Hannon
Assistant United States Attorney

Henry A. Berliner, Jr.
Assistant United States Attorney

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[1] Pursuant to F.R.C.P. Rule 36, the defendant on February 3, 1967 filed the stated request for admission requiring answer within 10 days after service. Allowing 3 days for service, the plaintiff would have had until February 16, 1967 to deny the request for admission. On March 16, 1967, after this motion had been dictated but before it had been transcribed, (this was one month after the time had expired to deny such request for admission), the plaintiff denied the request for admission. Under the rules failure to deny such request for admission within the time allowed requires that the request for admission be deemed admitted. The denial is obviously untimely filed. Rule 36 also requires that the party denying the admission do so by means of a sworn statement which the plaintiff did not do. In any case, the defendant believes the facts are sufficiently developed at this stage to preclude the plaintiff from raising any issue of material fact.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff, a retired Army officer with over 30 years' service here sues the United States for loss of his overcoat and gloves in an unattended cloakroom at the Officers' Mess, Fort George G. Meade, Maryland on January 21, 1965.

Plaintiff was attending a "bingo party and dinner" and alleges that the "cost" for the use of the cloakroom in his "payment of bingo fee, club dues and dinner fee." (Int. No. 9(b) and (c)). Plaintiff does not allege that a claim check was obtained or requested or that money was given to the Officers' Mess specifically to assume custody of plaintiff's property. However, plaintiff contends that a bailment for hire exists based upon the following facts:

> "7. Plaintiff is a member of the Officers Mess at Ft. Geo G. Meade which maintains a cloak room for its members and guests so that the premises will not become cluttered by articles of apparel strewn over the premises making the club unsightly, and thus offensive to the good taste and esthetic predilections of the members and guests." (Int. No. 7)

The liability of an owner for the loss of property in his place of business may rest on an express or implied bailment. An essential element of a bailment is that the alleged bailee knows of the article placed in his custody or has had the article actually delivered to him. In the absence of notice or delivery there cannot be a bailment. *Mickey v. Sears Roebuck & Company*, 196 Md. 326, 76 A.2d 350 (1950); *Schliesner Co. v. Birchett*, 202 Md. 360, 96 A.2d 494 (1953). Since the acts complained of took place in the State of Maryland, the law of Maryland with respect to bailments applies.

In *Mickey v. Sears, supra*, plaintiff left his brief case on defendant's loading platform. The brief case was later returned by agents of the defendant but the contents had been removed. There the Court held no bailment existed of the *contents* of the receptacle without knowledge or notice to the defendant.

Since the plaintiff made no delivery to any agent of the defendant, the defendant has only a duty of ordinary care as a gratuitous bailee and the "bailment" is in fact a mere depositum or naked bailment. *Lewis v. Aderholdt*, 203 A.2d 919 (D.C. Mun. Ct. App. 1964). The *Lewis* case holds that actual delivery is required even where payment is made for the use of space in a leased locker. Accord, *1420 Park Road Parking, Inc. v. Consolidated Mutual Insurance Company*, 168 A.2d 900 (D.C. Mun. Ct. App. 1961). The defendant is liable only for wrongful conduct as a gratuitous bailee. *Schermer v. Neurath*, 54 Md. 491 (Md. Ct. App. 1880).

Unless the reputed bailee knows of the articles or knows that they have been delivered to him there cannot be a bailment. Bailment is a consensual transaction. Responsibilities, duties, and liabilities may not be thrust upon a party without his consent. *Williston on Contracts*, (Section 1038A, Second Ed.)[1] Here the plaintiff without giving any notice to the defendant or to any agent of the defendant, and without receiving any claim check or paying any money for the privilege of having his articles checked, seeks to impose duties, obligations and liabilities upon a *non-consenting* defendant who has neither actual nor constructive notice of the alleged bailment.

In *McFarland v. C.A.R. Corp.*, 58 N.J. Super. 449, 156 A.2d 488 (1959), an automobile was damaged in the defendant's parking lot adjacent to the defendant's restaurant and tavern. The defendant's employee had indicated to the owner the place where he was to park his car. *The owner had retained the keys.* As the Court said:

> "Plaintiff had nothing more than a mere license or privilege to park on the premises by reason of his attending the restaurant for dinner and to arrange for the prospective dinner." (156 A.2d at 489).

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[1] The plaintiff, a professor of law at Georgetown University is the author of *Williston on Contracts*, Third Edition. That portion of the revised section dealing with bailments has not been published as of this date.

In *National Fire Insurance Co. v. Commodore Hotel*, 107 N.W. 2d 708 S.Ct. Minn. (1961), the plaintiff left a mink jacket in an unattended cloakroom on the defendant's premises. In holding that no bailment could exist without actual acceptance of a duty by the bailee, the Court stated:

> "Where evidence failed to establish that defendant had accepted delivery of mink jacket from owner, or that owner had parted with its control and custody when she left it in an unattended cloakroom on defendant's premises, held court correctly determined that bail relationship between owner and defendant covering such visit had not been created." (Syllabus by Court, 107 N.W. 2d at 708)

The Court held that the fact that the cloakroom was unattended and that the defendant failed to warn the plaintiff that defendant was not responsible for such articles was of no assistance to the plaintiff in his unsuccessful attempt to establish the existence of bailment. As the Court noted:

> "In any event, we do not feel that there is incumbent upon a hotel or restaurant owner to keep an attendant in charge of a free cloakroom for luncheon or dinner guests or otherwise face liability for loss of articles placed therein." (107 N.W. 2d at 711).

The rationale of *McFarland* and *National Fire Insurance Company* cases is far more impelling in the present case since in *McFarland* the defendant was on *actual notice* of the plaintiff's car and directed where he should park such car and in *National Fire Insurance* the defendant as an innkeeper had a high duty of care. The same rationale denying existence of a bailment for hire has been applied to recreational facilities such as bowling alleys. See for example, *Scherrer v. Plaza Bowl Investment Company*, 277 S.W. 2d 695 (Kan. City Ct. App., Mo., 1955), in which it was held necessary to establish actual negligence on the part of the defendant bailee even though, as in the instant case, the plaintiff claimed he did not see a disclaimer of personal property left on the premises. The Court noted the proprietor

of a recreational establishment is not an insurer. Accord, 8 CJS Bailments 15(a) (1962 Ed.); and see cases collected at 1 A.L.R. 2d 802 (liability for loss of hat and coat in place of business).

For the foregoing reasons it is respectfully submitted that no genuine issue as to any material fact exists and that the defendant is entitled to judgment as a matter of law.

David G. Bress
United States Attorney

Joseph M. Hannon
Assistant United States Attorney

Henry A. Berliner, Jr.
Assistant United States Attorney

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, Walter H. E. Jaeger, by his attorney, Paul J. Mc Garvey, and respectfully moves this Honorable Court to deny the defendant's motion for summary judgment on the ground that there is a genuine issue of fact and as a matter of law the defendant is not entitled to summary judgment.

Paul J. Mc Garvey
Attorney for Plaintiff

[Certificate of Service]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

The defendant provided a cloak room where the plaintiff left apparel. Defendant's argument that there was no bailment because the defendant had no notice is fallacious since there was an implied bailment in any event.

The case of *Mickey v. Sears, Roebuck & Company*, 196 Md. 326, 76 A 2d 350 which the defendant cites is not analogous since in that case recovery was sought for the *contents* of a brief case. In *Mickey v. Sears* the Court held there was no bailment because the bailee had no knowledge of the contents. In this case the bailee provided the cloakroom cognizant of the fact that coats would be bailed therein. Plaintiff here is not seeking recovery of *non-disclosed* contents of the coat, but the coat itself.

Defendant contends that we have here a mere depositum of naked bailment. In so arguing the defendant cites *Lewis v. Aderholdt*, 203 A 2d 919, *1420 Park Road Parking Inc. v. Consolidated Mutual Insurance Company*, 168 A 2d 900. Those cases, however, are readily and patently distinguishable from the case at bar. In those cases the plaintiff retained the key to his property. There was no surrender of dominion and control. Control was *exclusively* in the plaintiff. In this case the plaintiff surrendered control of his property when he left it in the cloakroom. Obviously, the defendant had control over the property dissimilar to the situation in the *Lewis* and *1420 Park Road Parking Inc.* cases where the purported bailor excluded the alleged bailee or any other person from exercising dominion and control over the property.

Even assuming that we have here a gratuitous bailment, which is not the case, but for the purpose of argument the defendant would be liable to exercise ordinary care that a person in a similar business would exercise. Can it be said that the defendant in this case exercised ordinary care when

the plaintiff's property was missing from the very place provided by the defendant? The Court should accord the plaintiff every reasonable inference in deciding the defendant's Motion for Summary Judgment.

On the basis of the foregoing, the defendant is not entitled to summary judgment.

Paul J. Mc Garvey
Attorney for Plaintiff

ORDER

Upon consideration of defendant's motion for summary judgment and the memorandum of points and authorities in support thereof; plaintiff's opposition thereto; and it appearing to the Court that there exists no genuine issue of material fact,

It is by the Court this day of June, 1967.

ORDERED that the defendant's motion for summary judgment be, and hereby is, granted and that the complaint be, and hereby is dismissed.

United States District Judge

[Certificate of Service]

NOTICE OF APPEAL

Notice is hereby given this 3rd day of July, 1967, that plaintiff, Walter H. E. Jaeger hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 16th day of June, 1967 in favor of defendant, United States of America against said plaintiff, Walter H. E. Jaeger.

Paul J. Mc Garvey
Attorney for Plaintiff

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,214

WALTER H. E. JAEGER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
LAWRENCE E. SHINNICK,
A. LEE FENTRESS, JR.,
Assistant United States Attorneys.

C.A. No. 379-66

QUESTION PRESENTED

Is there a factual issue as to the existence of a bailment where appellant personally placed his overcoat and gloves in a cloakroom of a private club, at no time saw anyone in or about the cloakroom who was concluded to be an attendant, and never obtained or requested a claim check or paid any consideration to the club specifically to assume custody of the property?

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TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant filed suit against the United States seeking damages for the loss of an overcoat and gloves in a cloakroom at the Officers' Mess, Fort George G. Meade, Maryland on January 21, 1965.

The complaint alleges that appellant, a retired Army officer with over 30 years service, visited the Officers' Open Mess at Fort Meade, Maryland on or about January 21, 1965 and left his coat and gloves in an outer cloakroom (J.A. 1). Subsequently, the complaint continues, appellant returned for his attire but the same were missing (J.A. 1).

Appellant describes himself as a "frequent" visitor to the Officers' Mess, having left his belongings in the Club's cloakroom "from time to time" (J.A. 4, 5, 6). While appellant is sufficiently familiar with the surroundings to describe the cloakroom, specifying its location, physical equipment and markings as "Members Only", he denies ever seeing signs located both at the entrance of the Club and at either of the cloakrooms located inside the Officers' Club stating, "Not Responsible for Coats Left in Check of Club" (J.A. 4, 5, 6). Appellant does not allege that a claim check was obtained or requested or that money was given to the Officers' Mess specifically to assume custody of appellant's property.

Following its answer the Government submitted written interrogatories, supplemental interrogatories and requests for admissions (J.A. 1, 3, 7). Appellant replied with answers to the interrogatories, supplemental interrogatories and request for admissions (J.A. 5, 8, 9). Appellee then filed its Motion for Summary Judgment together with a Memorandum of Points and Authorities (J.A. 9, 11). Appellant followed with an Opposition to said motion together with Points and Authorities (J.A. 14). On June 16, 1967, the District Court granted appellee's Motion for Summary Judgment (J.A. 16).

SUMMARY OF ARGUMENT AND ARGUMENT

On the facts of this case, it is clear that no bailment existed as a matter of law.

Appellant personally placed his overcoat and gloves in the cloakroom of the Officers' Mess (J.A. 8) at 7:00 P.M. on [redacted] 21, 1965 (J.A. 4, 6). At 10:05 P.M. appellant notified the Club manager that his overcoat and gloves were missing (J.A. 4, 5, 6). At no time did appellant see anyone in or about the cloakroom, who was concluded to be an attendant in such cloakroom (J.A. 8). It is not alleged that a claim check was ever obtained or requested or that money was given to the Club specifically

to assume custody of appellant's property. Appellee submits that on these facts it is clear that no bailment existed as a matter of law.

Essential to a bailment is that the property be turned over into the possession and control of the bailee. In the absence of notice or delivery there cannot be a bailment. *Mickey* v. *Sears Roebuck & Co.*, 196 Md. 326, 76 A2d 350 (1950); *McFarland* v. *C.A.R. Corp.*, 58 N.J. Super. 449, 156 A.2d 488 (1959).

Unless the reputed bailor knows of the articles or knows that they have been delivered to him there cannot be a bailment.[1] Bailment is a consensual transaction. *Mickey* v. *Sears Roebuck & Co.*, 196 Md. 326, 76 A.2d 350 liabilities may not be thrust upon a party without his consent. *Lewis* v. *Adenholdt*, 203 A.2d 919 (D.C. Mun. App. 1964); *1420 Park Road Parking* v. *Consolidated Mutual Insurance Co.*, 168 A.2d 900 (D.C. Mun. App. 1961).

Here it is undisputed that Mr. Jaeger did not inform the Club or any of its employees that he was leaving a coat and gloves in one of the cloakrooms. At no time did he surrender possession of the coat and gloves to the Club or its employees. There is nothing to indicate that the Club assumed any custody or control over it. If appellant had wished to reach his overcoat at any time during the meal or games, either to take something from one of his pockets or for any other purpose, he was entirely free to do so, without requiring any act on the part of the Club or its servants. The presence of the hooks may be construed into an invitation to the member

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[1]Appellant's use of *Schleisner Co.* v. *Birchett*, 202 Md. 360, 96 A.2d 494 (1953), as "the case most similar factually" is inapposite. (Brief of Appellant, p. 5). In that case, an employee was instructed by the personnel manager to hang her belongings in an executive closet. There the court concluded quite properly that the employer had a duty to return the employee's property following her delivery in compliance with the employer's instructions. The Club in the instant case, as shall be shown, has undertaken no such entrustment and has received no possession or notice of appellant's property necessary to constitute bailment.

to hang his coat upon them,[2] but hanging the coat and gloves upon the hook cannot be reasonably held to constitute a delivery of the property to the exclusive possession of the Club.

In *National Fire Insurance Co.* v. *Commodore Hotel*, 107 N.W.2d 708 (Minn. 1961), the plaintiff left a mink jacket in an unattended cloakroom on the defendant's premises. In holding that no bailment could exist without actual acceptance of a duty by bailee, it was concluded in the syllabus by the Court that:

> Where evidence failed to establish that defendant had accepted delivery of mink jacket from owner, or that owner had parted with its control and custody when she left it in an unattended cloakroom on defendant's premises, court correctly determined that bail relationships between owner and defendant covering such visit had not been created.

Id. at 708.

The Court held that the fact that the cloakroom was unattended and that the defendant failed to warn the plaintiff that defendant was not responsible for such articles was of no assistance to the plaintiff in his unsuccessful attempt to establish the existence of a bailment. As the court noted:

> In any event, we do not feel that it is incumbent upon a hotel or restaurant owner to keep an attendant in charge of a free cloakroom for luncheon or dinner guests or otherwise face liability for loss of articles placed therein.

Id. at 711.

In *McFarland* v. *C.A.R. Corp.*, 58 N.J. Super. 449, 156 A.2d 488 (1959), an automobile was damaged in the defendant's parking lot adjacent to the defendant's restaurant and tavern. The defendant's employee had indicated to the owner the place where he was to park his car. The owner had retained the keys. In holding that such cir-

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[2] See Brief of Appellant, pp. 3-4.

cumstances, where the plaintiff retained the keys to the car and was not given a claim check, did not meet the legal test of a bailment the Court concluded:

> While the trial court seems to have been impressed by the fact that the parking lot was offered as an inducement to the public to drive and drink at defendant's establishment, that fact would be relevant only upon finding that a bailment existed, i.e., in determining whether the bailment was a gratuitous one or a bailment for mutual benefit. Clearly, the benefit to the defendant should not in itself determine the existance of a bailment, absent more concrete evidence than is present in this case of possession and control of the car having been turned over to defendant's agent by plaintiff.

The rationale of both the *McFarland* and *National Fire Insurance Co.* cases is impelling in the instant situation to dictate a conclusion that no bailment came into existence. At no time was there an effective delivery of the coat and gloves to the Club or its servants. On the contrary, the facts are conclusive that Mr. Jaeger retained the complete control and dominion over the property while in the Club. Appellant's arguments to the contrary are not persuasive.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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